Office-Supreme Court, U.S.
FILED
FEB 18 1967
JOHN F. DAVIS, CLERK

No. 1076

In the Supreme Court of the United States

October Term, 1966

JERRY SINE and DORA A. SINE, his wife,
Petitioners,

v.

HENRY C. HELLAND, DIRECTOR OF HIGHWAYS, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Wm. G. Fowler
Counsel for Petitioner
340 East Fourth South Street
Salt Lake City, Utah

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS	2
CONSTITUTIONAL PROVISION	3
STATEMENT	3
CONCLUSION	18

CITATIONS

Cases:

Alvers v. County of Los Angeles, 42 Cal. Rep. 89, 398 P.2d 129	15
Arkansas State Highway Commission v. Kincannon, 193 Ark. 450, 100 S.W. 2d 969	15
Ballard v. Hunter, 204 U.S. 241	11
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673	10
Colorado Springs v. Stark, 57 Colo. 389, 140 P. 794	15
Cope v. Toronto, 8 U. 2d 255, 332 P.2d 977	18
Curry v. McCanless, 307 U.S. 357	10
Eggert v. Ford, 150 P.2d 719, 21 Wash. 2d 152	17
Endicott-Johnson Corp. v. Smith, 266 U.S. 291	10
French v. Barker Asphalt Paving Co., 181 U.S. 324, 329	10
Hibben v. Smith, 191 U.S. 310, 325	10

Horn v. City of Chicago, 392 Ill. 172 64 N.E. 2d 506 15

Kane v. City of Chicago, 392 Ill. 172 64 N.E. 2d 506 15

Kennard v. Louisiana, ex vel. Morgan, 92 U.S. 480 10

Little Rock and F.S.R. Co. v. Geer, 77 Ark. 387, 96 S.W. 129 15

Logan County v. Alder, 69 Colo. 290, 194 Par. 621 15

Mannerfried v. Brownell, (App. D.C.A., D.C., 1956) 238 F.2d 32, Cert. denied, 352, U.S. 1017 ..... 8, 9

Minder v. Georgia, 183 U.S. 559 10

Minneapolis and St. L. R. Co. v. Beckivith, 129 U.S. 26 17

Monongahela Navigation Co. v. United States, 148 U.S. 312 13

Morgan v. Fourth Judicial District Court of Wasatch County, 105 Utah 140, 141 P. 2d 886.. 18

National Labor Relations Board vs. Clark Bros Co., (C.A. ad, 1947) 163 F.2d 373 8

Pennoyer v. Neff, 95 U.S. 714 10

Prudential Insurance Co. of American v. Rader, (D.C., 1951), 98 F. Supp. 44 8

Seaboard Airlines R. Co. v. United States, 261 U. S. 299 12

Spilkers v. Hankin (App. D.C., 1951) 188 F.2d 35 8

State v. Fourth Judicial District Court, 94 Utah 384, 78 P.2d 502 ..... 6, 7, 11, 12, 14

State v. Parker, 13 Utah 2d 65, 368 P.2d 585 (1962) 5, 7

Tanner v. Provo Bench Canal and Irrigation Co., 40 Utah 105, 121 P. 584 15

Turpin v. LeMon, 187 U.S. 51 11

U.S. v. Lynch, 188 U.S. 448 15

Wagner v. Leser, 239 U.S. 207 10

West v. Chesapeake & P. Teleph Co., 295 U.S. 662 16

Wheadon v. Pearson, 14 Utah 2d 45, 375 P. 2d 946 (1962) 9

Constitutional Provisions:

Article I, Section 22 of Utah Constitution 3, 6, 7, 11, 16

Fifth Amendment to United States Constitution.... 16

Fourteenth Amendment to United States Constitution..... 2, 3, 9, 10, 11, 16

No.....

In the Supreme Court of the United States

October Term, 1966

JERRY SINE and DORA A. SINE, his wife,
Petitioners,

v.

HENRY C. HELLAND, DIRECTOR OF HIGHWAYS, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah entered in the above case on October 21, 1966.

OPINIONS BELOW

The Supreme Court of the State of Utah issued its opinion on October 21, 1966. A copy of said opinion is annexed hereto as Exhibit A, and made a part hereof by reference.

The Supreme Court of the State of Utah issued a prior opinion on January 31, 1962, and said opinion is reported in 368 P.2d 585. A copy of said opinion is annexed hereto as Exhibit B, and made a part hereof by reference.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was made and entered on the 21st day of October, 1966. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Whether the defense of sovereign immunity asserted by the State of Utah in a prior action for damages to private property not sought to be taken by way of condemnation, rendered res judicata the claim of petitioners that their property was taken without due process of law.

2. Whether petitioners were denied their constitutional rights provided in the Constitution of the State of Utah, and as provided in the Fourteenth Amendment to the United States Constitution in that no state shall deprive any person of property without due process of

law nor deny to any person within its jurisdiction the equal protection of the laws.

3. Whether the dismissal of petitioners' counterclaim and petition for Writ of Mandamus denied petitioners the right to a judicial determination with respect to "just compensation" for damages to their property as a result of the taking of adjacent property for a public use.

4. Whether the State of Utah denied petitioners equal protection of the laws guaranteed to citizens by the Fourteenth Amendment of the United States Constitution.

5. Whether petitioners have been denied a judicial determination of "just compensation" for property damaged for a public use in contravention of Artiele I, Section 22 of the Utah Constitution and the Fourteenth Amendment.

CONSTITUTIONAL PROVISION

Article I, Section 22 of the Utah State Constitution provides as follows:

> "Private property shall not be taken or damaged for public use without just compensation."

STATEMENT

The State of Utah by its State Road Commission filed a complaint for condemnation in December, 1958, seeking to condemn certain private lands in Salt Lake City, Utah, and to take the same for a public use. The

project involved the construction of an interstate highway through metropolitan Salt Lake City. Petitioners were named in the complaint as defendants with several other property owners. In April, 1959, petitioners filed what they designated a counterclaim seeking to establish damages and to obtain compensation for an additional and adjacent parcel of property not described in respondent's complaint and not sought for condemnation.

Respondent answered the counterclaim of petitioners in May, 1959, denying that the Third Judicial District Court in and for Salt Lake County, State of Utah, had jurisdiction over the counterclaim because the property which formed the subject matter of the claim had not been sought for a public use through condemnation and thus the state had not consented to be sued with respect to the same.

The respondent moved for summary judgment at the pretrial conference April 14, 1961, asserting that the doctrine of sovereign immunity bars any counterclaim for damages to property not part of that sought for condemnation; that the State of Utah was not responsible to petitioners for "consequential damages" to property not taken for a public use; and that the property for petitioners was not a part of a parcel which was taken so that severance of the two would substantially effect the use of that not taken.

The Third Judicial District Court denied respondent's motion for summary judgment and the respondent sought and was granted an interlocutory appeal to the Supreme Court of the State of Utah. The appeal was taken on the same grounds upon which the summary

judgment was sought. On January 13, 1962, the Supreme Court of Utah ruled that the respondent was immune to an action by petitioners to establish "consequential" damages to property not sought to be taken by condemnation and not described in respondent's condemnation complaint. *State v. Parker,* 13 Utah 2d 65, 368 P.2d 585 (1962).

Petitioners subsequently obtained from the Third Judicial District Court of the State of Utah a Writ of Mandamus requiring the respondent to bring an action in condemnation to take the property which had been substantially damaged by the taking of and consequent construction on adjacent property; to establish damages and award "just compensation" therefor. Petitioners alleged damages to said property in excess of $400,000.00, consisting of material and substantial structural damages to several motel units on said property and a substantial loss of profits. The damages were caused by subsidence directly related to the enormous fill immediately adjacent to petitioners' property.

Respondent moved for dismissal of the Writ of Mandamus on the basis of sovereign immunity because the property had not been sought for condemnation and was not a part of a parcel which had been taken. Respondents motion was denied by the court and an interlocutory appeal was taken to the Utah Supreme Court.

The Utah Supreme Court ruled that the petitioners could not achieve by mandamus what they could not achieve by direct suit and that the issue of sovereign immunity decided in *State v. Parker, supra,* was res judicata in the mandamus proceeding.

In the original opinion of the Supreme Court of Utah a remedy was proposed to petitioners, and the suggestion was made that recourse for damages could be had through the Utah Board of Examiners and the Utah State Legislature. The Board of Examiners is a constitutional body consisting of the Governor, the Secretary of State and the Attorney General. This recourse is not tantamount to due process of law by express ruling of the Utah Supreme Court in *State v. Fourth Judicial District Court,* 94 Utah 384, 78 P.2d 502. The Board of Examiners recommended to the Utah State Legislature that approximately $8,000.00 be appropriated to compensate petitioners for their damage — this fact dehors the record on appeal.

A DETERMINATION BY THE SUPREME COURT OF UTAH THAT THE SOVEREIGN CANNOT BE SUED WITHOUT ITS CONSENT IS NOT RES JUDICATA AS TO ANY AND ALL ACTIONS BY WHICH PETITIONERS MAY SEEK TO ESTABLISH THEIR RIGHTS TO COMPENSATION FOR DAMAGES TO THEIR PROPERTY BY THE STATE ROAD COMMISSION OF THE STATE OF UTAH.

The conclusion that the sovereign is immune from suit unless it consents begs the issue at hand when the very thing petitioners seek to establish is compensable damages as provided in Article I, Section 22, Utah Constitution. If damages can be proven the state can effectively be sued. As the Supreme Court of Utah stated in *State vs. Fourth Judicial District Court, supra,* at p. 509:

> "We think if a case arises where there is no other method of enforcing a constitutional right except by suit against the state, then it must be considered that the state has given its consent to be sued in such a case."

Petitioners were defendants in a condemnation proceeding brought by the State of Utah against a parcel of property owned by them. That action did not seek to take the parcel which is the subject of the present litigation. *State vs. Parker, supra.* The petitioners filed a counterclaim by which they sought to establish damages in the sum of $401,000.00 to property not described in the State's Complaint but situated in the general vicinity.

The Supreme Court of Utah determined that petitioners could not establish damages by placing themselves in the position of a plaintiff since the property had not been part of what was sought to be taken in the condemnation proceeding. Accordingly, by their reasoning sovereign immunity would bar the asserted counterclaim. This ruling did not determine whether compensable damages were suffered as provided in the Utah Constitution, Article I, Section 22. Rather, the determination effectively precluded any consideration of the issue of damages.

Petitioners herein subsequently obtained a Writ of Mandamus from the Third Judicial District Court of the State of Utah, seeking to compel the State of Utah to proceed against them by way of condemnation in order that their damage might be ascertained. The earlier dismissal was deemed by the Supreme Court of Utah to be res judicata. The state had not consented to be

sued according to that Court and petitioners could not establish damages through mandamus because they were barred by sovereign immunity.

Petitioners contend that the mandamus proceeding properly was brought and that it presented for the first time the issue of compensable damages evaded by the State Supreme Court's holding that the dismissal of the earlier proceeding (which did not consider the question of damages) was res judicata.

It is well established that issues decided are not res judicata as to issues not decided even though such issues may lurk in the background. *National Labor Relations Board vs. Clark Bros. Co.* (C.A. ad, 1947), 163 F.2d 373; see also *Prudential Insurance Co. of America v. Rader,* (D.C. Minn., 1951) 98 F. Supp. 44, where the court stated:

> "Issues not presented for determination in a declaratory proceeding are not rendered res judicata by a determination of issues presented, at least when determination of issues presented does not necessarily determine issues not presented." See *National Popsicle Corp. v. Icyclair Inc.* (C.A. 9th, 1941) 119 F.2d 799.

Assuming, *arguendo,* that the Utah ruling is bottomed upon no compensable damages being shown because the State had not sought condemnation, such issue was not before the court and certainly no facts or evidence were considered to justify that conclusion. Such assumed facts are not res judicata and cannot foreclose a judicial determination of the true facts, especially when to do so will deprive petitioners of property without just compensation and without due process of law. See *Mannerfried v. Brownell,* (C.A. D.C., 1956), 238

F.2d 32, Cert. denied, 352 U.S. 1017. To support the doctrine of res judicata, it must be shown that a determination was made upon an issue necessarily presented resulting in a finding of no compensable damage to petitioners' property for which they should receive "just compensation" as provided in the Utah Constitution and in the due process clause of the Fourteenth Amendment to the Constitution. In *Spilkers v. Hankin* (App. D.C., 1951), 188 F.2d 35, it was held that one seeking the benefit of the doctrine of res judicata has the burden of showing that all issues were determined in the earlier action. See also *Wheadon v. Pearson,* 14 Utah 2d 45, 376 P.2d 946 (1962), holding that the doctrine of res judicata applies only to those who were parties to the earlier litigation or their privies. In the original condemnation action the court ruled, in effect, that petitioners were not parties to the action insofar as adjacent property was concerned. This certainly must be deemed a proper and lawful result, leaving petitioners with no reasonable alternative but to pursue their loss by a mandamus proceeding.

THE INTERPRETATION OF THE UTAH CONSTITUTION BY THE SUPREME COURT OF UTAH IS ARBITRARY AND CAPRICIOUS AND SANCTIONS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

"The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty and property, as

is offered by the Fifth Amendment against similar legislation by Congress. . . ." *Hibben v. Smith,* 191 U.S. 310, 325; *Curry v. McCanless,* 307 U.S. 357; see also *French v. Barker Asphalt Paving Co.,* 181 U.S. 324, 329. This guarantee of protection against deprivation of property without due process of law is available to persons arbitrarily deprived of their rights by State action whether under the guise of legislative authority or otherwise. *Wagner v. Leser,* 239 U.S. 207. Similarly, a violation of due process may be accomplished by the state judiciary in the course of construing an otherwise valid statute. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673. This is equally applicable to the legislative, executive or administrative branches of government (ibid.).

Due process has been described by this court to be satisfied if a trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government. *Minder v. Georgia,* 183 U.S. 559. The term due process of law has also been described as a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. *Kennard v. Louisiana, ex vel. Morgan,* 92 U.S. 480; *Pennoyer v. Neff,* 95 U.S. 714; *Endicott-Johnson Corp. v. Smith,* 266 U.S. 291. It must be pursued in the ordinary rule prescribed by law; it must be adopted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judg-

ment sought. The due process clause means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Turpin v. LeMon,* 187 U.S. 51. See also *Ballard v. Hunter,* 204 U.S. 241.

Article I, Section 22 of the Utah Constitution provides in part: "Private property shall not be taken or damaged for public use without just compensation." In addition, the Utah Supreme Court has stated that "The question of what constitutes 'just compensation' is a judicial question which the land owner has the right to have determined in accordance with the general rules established for eminent domain proceedings in the particular jurisdiction. In Utah, the assessment of compensation in eminent domain proceedings is to be by a court or jury. R. S. Utah 1933, Title 104, c. 61. We think the officers of the State cannot force the land owner to submit the determination of what is 'just compensation' to the Legislature or to the Board of Examiners (from which there is not appeal to the courts except for abuse of discretion). It may be considered settled that the fixing of compensation for private property taken for public use is a judicial and not a legislative question." *State v. Fourth Judicial District Court, supra.*

In the initial action, petitioners attempted to raise their claim for damages by way of a counterclaim against the State Road Commission. Their counterclaim was dismissed without allowing petitioners an opportunity to present their claim for damages. On appeal the Utah Supreme Court sustained the dismissal of petitioners'

counterclaim. The petitioners then went before the State Board of Examiners. However, the Utah Court has held that, "Under the statutes of Utah relating to eminent domain, and under the constitutional provisions of Utah herein referred to, the plaintiffs in the injunction suit cannot be compelled to submit to the Legislature or the Board of Examiners the question whether their property has been damaged by the construction complained of nor the question of what amount will compensate them for such damage." *State v. Fourth Judicial District Court, supra,* at p. 512.

Since the Utah Court has stated that a proceeding before the Board of Examiners is not a hearing within the meaning of due process, the petitioners effectively had been denied the opportunity to present their claim to any state authority which would constitute a hearing in the due process sense. Petitioners then petitioned for Writ of Mandamus to compel a condemnation proceeding which petition was granted by the Judge of the Third Judicial District Court of Salt Lake County. This procedure is approved. However, the Supreme Court of Utah reversed the Third Judicial District Court, thereby effectively precluding petitioners an opportunity to have a hearing and present their evidence and claim for compensation. The net result of the action of the Courts of the State of Utah is to allow the State to use petitioners' property without allowing petitioners any means by which to contest such action or receive compensation therefor. This is a denial of the minimal requirements of procedural and substantive due process. See *Seaboard Airlines R. Co. v. United States,* 261 U.S. 299.

PETITIONERS' PROPERTY HAS BEEN DAMAGED AND USED BY THE STATE OF UTAH WITHOUT "JUST COMPENSATION" THEREFOR.

The dismissal of petitioners' counterclaim in the respondent's original condemnation action, and the subsequent dismissal of the petition for a Writ of Mandamus seeking to compel condemnation of petitioners' property by respondent, effectively denied petitioner the opportunity to show actual damages and loss. By such a denial the respondent was enabled to damage and otherwise make use of petitioners' property without paying just compensation therefor.

This Honorable Court stated in *Monongahela Navigation Co. v. United States,* 148 U.S. 312 in reviewing a legislative enactment, concluded:

> "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial."

The State of Utah by and through its Road Commission did not describe any of petitioners' property, except a separate parcel, in their complaint for condemnation. Then when petitioners sought to establish damages by way of counterclaim for property not named in respondent's complaint, the Utah Supreme Court held, in essence, that the State had not consented to be sued except for property taken (i.e., property named in

the state's condemnation action). The conclusion of the court was reached without any determination of damages but merely on the premise that the property was not part of the parcel sought to be taken by the condemnation action.

Speaking to the issue of "damage," as defined by the State Constitution in *State v. Fourth Judicial District Court, supra,* the Utah Supreme Court correctly summarized the law, as follows:

> "We do not believe that the Constitution intends that the court shall decide in advance whether there is a damage amounting to a taking and refuse the injunction in case the damage is found to be less than enough to constitute a 'taking' of property. Infinite confusion results from such a rule . . . .
>
> * * *
>
> "We believe that the line of demarcation should be drawn at the point of 'actionable damage.' The Constitution clearly does not require compensation for damages not recognized as actionable at common law, but for a damaging of property 'to the actionable degree.' The Constitutional makers intended the land owner to have just compensation equally with the land owner whose property was physically taken."

This precisely embraces the instant fact situation.

Certainly in this action the State of Utah has taken the position that unless a portion of the land of a property owner is taken there can be no "taking or damage" of the property. Even in states which do not have a constitutional provision respecting "damaging" of the property, it has been held that the injury suffered is

nonetheless compensable. See *Colorado Springs v. Stark,* 57 Colo. 389, 140 P.794 (Railroad embankment caused damage); *Little Rock and F.S.R. Co. v. Geer,* 77 Ark. 387, 96 S.W. 129 (damage, but not taking); *Horn v. City of Chicago,* 403 Ill. 549, 97 N.E. 2d 642 (damage by road construction as to easements of light and air and of access).

In Utah, however, the language is unequivocal to the effect that damages incident to taking, and certainly where the damage is a natural, foreseeable consequence of the taking, a judicial remedy is deemed to exist. See *Kane v. City of Chicago,* 392 Ill. 172, 64 N.E. 2d 506 (Bridge); *U.S. v. Lynch,* 188 U.S. 445; *Alvers v. County of Los Angeles,* 42 Cal. Rep. 89, 398 P.2d 129; *Tanner v. Provo Bench Canal & Irrigation Co.,* 40 Utah 105, 121 P. 584; *Logan County v. Adler,* 69 Colo. 290, 194 Par. 621; *Arkansas State Highway Commission v. Kincannon,* 193 Ark. 450, 100 S.W. 2d 969.

It is clear from Article I, Section 22 of the Utah Constitution that petitioner is entitled to compensation *for damages* to his property sustained from the state's action whether or not the property is sought to be taken or condemned by the state. And such damages are entitled to a judicial determination of "just compensation." Article I, Section 22 of the Utah State Constitution reads as follows:

> "Private property shall not be taken *or damaged* for public use without just compensation." (Emphasis supplied).

The Constitution of the United States entitles petitioners to compensation for their property which has

been damaged for a public use. *West v. Chesapeake and P. Teleph. Co.*, 195 U.S. 662. In that case, this Court held that the due process clause of the Fifth and Fourteenth Amendments to the Federal Constitution precludes the national and state governments from requiring the use of privately owned property without just compensation.

THE STATE OF UTAH BY JUDICIAL DETERMINATION EFFECTIVELY HAS DENIED PETITIONERS EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT HAS MADE AN ARBITRARY AND DISCRIMINATORY CLASSIFICATION AND DISTINCTION BETWEEN PROPERTY OWNERS.

Article I, Section 22 of the Utah Constitution provides that a person whose property is *taken or damaged* by the state is entitled to just compensation. On its face, this constitutional provision does not appear to be discriminatory or arbitrary in classifying those persons entitled to compensation. It means any person who has a property interest is entitled to compensation if it is "taken" or "damaged" by the state. However, since the Supreme Court of Utah has sought to interpret this constitutional provision, the reasonableness of the Article can only be determined in the light of that interpretation.

By its decision in the instant case, the Utah Court has allowed compensation only to those property owners

whose property is "taken" or "damaged" pursuant to a condemnation proceeding. Those persons whose property has been taken or damaged without the benefit of condemnation proceedings are entitled to no compensation. Both parties have suffered loss or damage. Yet only one is entitled to compensation under the holding of the instant case. This interpretation gives the state or its agencies arbitrary power. It makes a condemnation proceeding a condition precedent to any recovery of just compensation irrespective of whether there is damage or a taking. By this interpretation the state could take, use, or even damage property and not be required to pay unless it decided to bring a condemnation action. The property owner is unable to recover because he is unable to compel condemnation. Thus there is discrimination between those persons who are subjected to condemnation action and those who are not. There is no justifiable reason for such discrimination. As was indicated in *Minneapolis and St. L.R. Co. v. Beckivith,* 129 U.S. 26, the equal protection clause does undoubtedly prohibit discriminating and partial legislation by any state in favor of particular persons as against others in a like condition. Equality of protection implies not merely redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. Certainly if the property of a person is taken or damaged by the state and compensation is awarded, another person similarly situated should also be entitled to recover if he can show his loss. To allow one to recover and the other to suffer is a flagrant violation of the fundamental principles of fairness and equality.

That mandamus is the appropriate remedy is established beyond cavil. *Cope v. Toronto,* 8 U.2d 255, 332 P.2d 977; *Morgan v. Fourth Judicial District Court of Wasatch County,* 105 Utah 140, 141 P.2d 886; *Eggert v. Ford,* 150 P.2d 719, 21 Wash. 2d 152.

CONCLUSION

It is respectfully submitted that the Supreme Court of Utah erred in its application of the res judicata doctrine, and that petitioners have been materially and substantially damaged by the State of Utah without due process of law.

Respectfully submitted,

WILLIAM G. FOWLER
Attorney for Petitioners
340 East Fourth South Street
Salt Lake City, Utah 84111

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 10540

Jerry Sine and Dora A. Sine, his wife,
Plaintiffs and Respondents,

v.

Henry C. Helland, Director of Highways, et al.,
Defendants and Appellants.

CALLISTER, Justice:

This is an interlocutory appeal from an order denying defendants' motion to dismiss plaintiffs' complaint, wherein the latter sought a writ of mandamus directing defendants to commence a condemnation proceeding to establish damages and to provide compensation for the taking of plaintiffs' property.

The motion to dismiss was on the grounds (1) that the defendants were being sued in their governmental capacity as Director of Highways, members of the State Road Commission, and the Attorney General, and as such were immune from suit, consent to be sued not having been given, and (2) that the matters pleaded in the complaint had been fully litigated in State v. Parker.[1]

In the Parker case the Sines alleged in a counterclaim damages to their motel property (which was not the property or any portion thereof being condemned) caused by the construction of an interstate highway and contended that such damage was compensable in that eminent domain proceeding.

This court stated that the fundamental question in the Parker case was whether the state was suable for consequential damage to property not sought for con-

1. 13 Utah 2d 65, 368 P.2d 585 (1962).

demnation. The court held that such damage is not recoverable because of the state's immunity. In particular, the court observed that Fairclough v. Salt Lake County[2] was dispositive of the issue therein presented.

Plaintiffs contend that the instant action is not barred by the doctrine of res judicata because the relief sought is a writ of mandamus to compel a condemnation action.

In Springville Banking Co. v. Barton,[3] the plaintiff sought a writ of mandamus to compel members of the State Road Commission to initiate eminent domain proceedings to assess damages allegedly caused by impairment of ingress to and egress from plaintiff's property.

This court stated:

> " . . . (1) Can plaintiff, employing the extraordinary writ of mandamus compel the state to pay damages when because of sovereign immunity, it could not have done so in a direct suit against the State or the Road Commission? and 2) Was the damage here compensable in any event?
>
> "As to 1) We believe and hold that the procedure chosen by plaintiff was an effort indirectly to do that which repeatedly we have held could not be done directly, which is dispositive of this case on that ground.
>
> "As to 2): . . . We espouse the notion that if the sovereign exercises its police power reasonably and for the good of all people, when constructing highways, consequential damages such as those alleged here, are not compensable . . . "

From the foregoing, this court holds that plaintiffs,

---

2. 10 Utah 2d 417, 354 P.2d 105 (1960).
3. 10 Utah 2d 100, 349 P.2d 157 (1960).

in the instant action, are attempting to relitigate the same matter already resolved in the prior Parker case.[4]

Reversed. No costs awarded.

WE CONCUR:

F. Henri Henriod, Chief Justice

Roger I. McDonough, Justice

J. Allen Crockett, Justice

R. L. Tuckett, Justice

---

4. See Wheadon v. Pearson, 14 Utah 2d 45, 376 P. 2d 946 (1962) for a complete statement of this court on the doctrine of res judicata.

EXHIBIT "B"

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 9489

State of Utah, by and through its Road Commission,
Plaintiff and Appellant,

v.

Joseph A. Parker, et al., Jerry Sine and Dora P. Sine, his wife,
Defendants and Respondents.

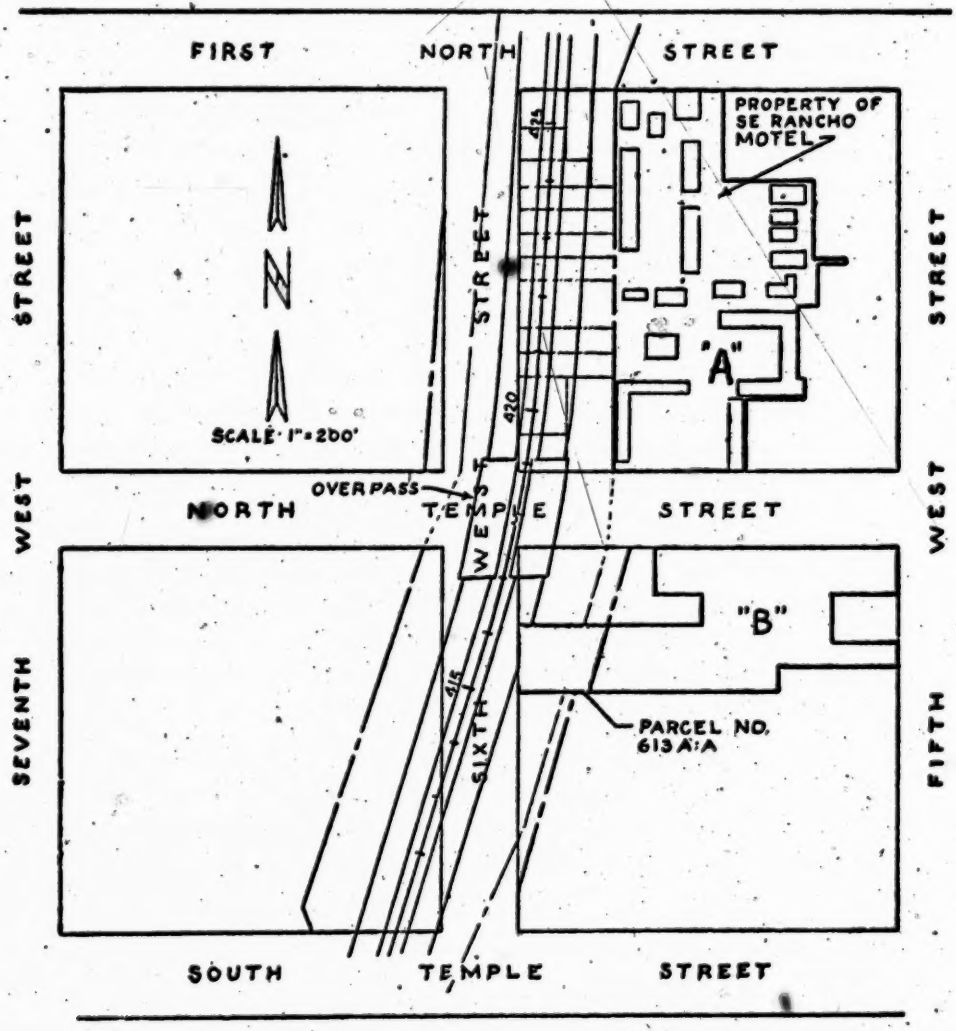
HENRIOD, Justice:

Interlocutory appeal by the State from a denial of its motion to dismiss defendant Sine's counterclaim suit by the State to acquire property for an interstate highway construction project. Reversed, with no costs awarded.

The subjoined sketch represents the overall property of Sine on the one hand and that described in the condemnation complaint.[1] It shows that Sine owned two tracts, "A" and "B," separated by a highway used to reach local streets and then on to California. The small shaded area included in "B" was the only property sought by the State and the only property described in the complaint.

It is conceded: That "A" is a motel property, having no economic or functional connection with "B," which latter was used strictly as a private residential property; that "A" was not the subject of condemnation. However, Sine urged that "A" was damaged by construction of the interstate highway, and that such

1. Title 78-34-7, Utah Code Annotated, 1953: "All persons in occupation of or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint."



damage was compensable in this eminent domain proceeding. He says the damage was an interference with light and air, subsurface pressure, sewer facilities and access, with a consequent loss of profits incident to the motel's operation.

After the State filed its action, Sine sued the contractor doing the work in constructing the North-South highway, elevated on stilts to cross over the then existing East-West highway leading to California, to en-

join further construction already begun, and for damages arising out of the alleged interferences mentioned supra. A motion to dismiss that action was granted by trial court on the asserted basis that Sine could litigate the issues in the State's condemnation proceeding. The State, no party to that action, is not bound by that ruling, nor are we.[2]

In a counterclaim filed in *this* case *after* the dismissal in the *other* case, Sine says that, 1) since he is a party to this action, he is entitled to damages as to "A," although it was not described in the State's complaint, nor was it the subject of condemnation; 2) that the counterclaim was proper under our rules of procedure, and 3) that the damages alleged are compensable in the instant action.

Contention 2) relates to procedure and joinder of parties. It does not go to the question of whether Sine has a compensable claim against the State, and therefore, for the purposes of this case, need not be canvassed, but may be conceded as having merit.

Contentions 1) and 3) may be viewed in the aggregate, since both pose the same fundamental question whether the State is suable for consequential damage to property not sought for condemnation.

On numerous occasions we have held that such damage is not recoverable because of the State's immunity. State v. Fairclough,[3] a case most similar to this one, is our last pronouncement in this respect. Therein are cited our previous decisions which we are disinclined to reverse. Contrariwise, we consider and hold that the Fairclough case and those cited therein are dispositive here, to which authorities we refer the reader without needless repetition.

---

2. Taylor v. Barker, 70 Utah 534, 262 P.266, 55 A.L.R. 1032 (1927), wherein the court said that, "The law is well settled that as a general rule a judgment is effective only between the parties to the action and their privies, and that no rights whatever, either in favor [of] or against strangers to the judgment, are acquired, lost, or affected by reason of the judgment."

3. 10 Utah 2d 417, 354 P.2d 105 (1960).

As to Sine's argument that he, being a defendant, may counterclaim and recover, is answerable by the simple and authoritative conclusion that neither under our rules or elsewhere, can a counterclaimant cast himself in any other role than that of a plaintiff.[4] If Sine, as plaintiff, had sued the State in this case, he would have been unable to proceed under the authorities referred to above. Since a counterclaim must be invested with all of the requisites of a complaint, it would strain reason to conclude that it would have any attribute that would alter nonresult into result.

If the State were not suable in this case in the first instance, it is not suable by counter-complaint, and we so hold.

WE CONCUR.

Roger I. McDonough, Justice

E. R. Callister, Jr., Justice

J. Allen Crockett, Justice

WADE, Chief Justice: (Dissenting)

I dissent, adhering to my views expressed in Springville Banking Company v. Burton,[1] and Fairclough v. Salt Lake Co.[2] By these decisions, this court has nullified a clear and unambiguous constitutional provision that "[P]rivate property shall not be taken or damaged for public use without just compensation."[3] I refuse to worship at the shrine of sovereign immunity where to do so, as in this case, requires a clear violation

---

4. Valley Gin Co. v. McCarthy, 56 Ariz. 181, 106 P.2d 504 (1940): "The term (counterclaim) is a general and comprehensive one and may be defined as a cause of action in favor of defendant upon which he might have sued the plaintiff and recovered judgment in a separate action." Wilson v. Tromly, 404 Ill. 307, 89 N.E. 2d 22 (1949); 479 Am. Jur. 736, sec. 37.

1. Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157.

2. Fairclough v. Salt Lake Co., 10 Utah 2d 417, 354 P.2d 105.

3. Section 22, Article I, Constitution of Utah.

of our constitution. These decisions are also clearly contrary to the modern trend of sovereign immunity.[4]

HENRIOD, Justice: (Separately commenting on the dissent of Mr. Chief Justice Wade, supra.)

I feel constrained to answer the dissent, without expecting my learned colleagues, who have concurred in the main opinion, to pass on the merits or demerits of the personal differences of opinion which Mr. Chief Justice Wade and I have harbored and do harbor here with respect to sovereign immunity and the authorities which the former cites in support of his conclusion.

I note with interest that the Chief Justice refers to a dissenting opinion of Justice Wolfe in *Bingham v. Board of Education,* "where he advocated the complete overruling of sovereign immunity." Advocacy for a personally desired result is a poor substitute for stare decisis, or for the emasculation of legislation which has been interpreted time and again by this court, and which I personally think construable differently than does the Chief Justice. I submit that the authorities overwhelm his conclusion.

It is conceded that *Muskopf v. Corning Hospital,* cited in the dissent, is the closest case supporting Mr. Chief Justice Wade's thesis, but the cases he urged in *Springville Banking Co. v. Burton, Fairclough v. Salt Lake County* and the others, it is submitted, did not and do not support his contention. In the Muskopf case, the main opinion, it is true, survived a strong and very con-

---

4. See Justice Wolfe's dissenting opinion in Bingham v. Board of Education, 118 Utah 582, 223 P.2d 432, where he advocated the complete overruling of sovereign immunity. Also the following cases from other states to the same effect: Muskopf v. Corning Hospital District, (Cal.) 359 P.2d 457; Hargrove v. Cocoa Beach, (Fla.) 96 So.2d 130, 60 A.L.R.2d 1193, Anno. Municipal immunity from liability from Torts, pp. 1198-1205: Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E. 2d 89; for comment on this case and legislative history thereafter see "Municipal Tort Liability in Illinois" page 475, by Robert Z. Hickman, University of Illinois Law Forum, Vol. 1961, Fall No. 3; Williams v. City of Detroit (Mich.) 111 N.W. 2d 1.

vincing dissent. That case heavily suggests judicial legislation, and shares Mr. Chief Justice Wade's refusal to worship at the shrine of sovereign immunity, and equally and just as religiously refuses to do else but justify objectivity, with an irreverence for precedent. Although not binding on the California Supreme Court, nor this court, it is noteworthy that subsequent cases in the intermediate California appellate courts, seem to have interpreted the decision as not applicable to situations where the legislature has created the immunity or spoken with reference thereto.[1] The Muskopf case finds little comfort in the other cases cited by Mr. Chief Justice Wade.

Hargrove v. Cocoa Beach [2] has to do only with municipal liability on the city level, but nowhere else. Subsequent Florida cases clearly demonstrate its limitations. The Florida Supreme Court in *City of Miami v. Keton* [3] held that immunity could be imposed as a bar to a suit to remit erroneously collected fines. In *Smith v. Duval County Welfare Board,*[4] the court concluded that the Hargrove case did not purport to waive state immunity, relying on *Kegging v. Hillsborough County.*[5] It appears clear that the Hargrove case does not pretend to eliminate sovereign immunity on the state or other levels, but only as to a city, where, in effect, the distinction between governmental and proprietary functions was eliminated.

Illinois abolished municipal immunity in *Molitor v. Kaneland* Community Unit Dist. No. 302,[6] and by dicta gave the appearance of extending the abolition to other levels; however, the state of Illinois enjoys constitutional immunity.[7] This decision is therefore not directly applicable to suits against the state. Even so,

1. Ngim v. City and County of San Francisco, 13 Cal. Rptr. 849 (1961); Akers v. City of Palo Alto, 14 Cal. Rptr. 767 (1961).
2. Fla., 96 So. 2d 130, 69 A.L.R. 2d 1193 (1952).
3. Fla., 115 So. 2d 547 (1959).
4. 118 So. 2d 98 (D.C. App. Fla. 1960).
5. 71 Fla. 356, 71 So. 372 (1916).
6. 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).
7. Ill. Const., Art. 4, Sec. 26.

the subsequent history demonstrates the weakness of this case as precedent. Within 40 days of the next legislative session, the Illinois Legislature passed five bills that in effect recognized the doctrine of sovereign immunity as to local agencies. *Hickman, Municipal Tort Liability in Illinois.*[8] Subsequent cases from that state, both federal and state, have recognized that the Illinois Legislature had much at stake in the sovereign immunity principle. *Miller v. City of Chicago.*[9]

The most recently expressed effort to eliminate sovereign immunity was reflected in *Williams v. City of Detroit.*[10] The case itself netted plaintiff nothing, since the court divided on the question of abolishing sovereign immunity. A majority indicated, however, that from that time on the doctrine would not apply. The opinion of Justice Carr is persuasive in reflecting the objection to such action, when he said that "The radical departure *from existing law* in this State contemplated by Justice Edwards, and those of like mind with him, obviously involves the exercise of legislative authority. The fact that the change to be made is prospective only is significant in this respect." A most appalling factor of the Michigan decision is the majority opinion's noting of the fact that the legislature had failed to respond to pleas for abolition of the doctrine and hence the courts, in the name of "Justice," are justified in engaging in legislation in spite of constitutional mandates to the contrary. The decision is too recent to canvass the response of the Michigan Legislature to the court's new estate, but it is sufficient to note that the court recognizes the minority position in the case, when Mr. Justice Carr says that "Attention is called to Court decisions in Florida, Illinois and California, in each instance by a divided court, rejecting the doctrine of governmental immunity. We cannot agree that such decisions, *in view of the overwhelming*

8. Illinois Law Forum, 1961, p. 475; 54 North Western U.L. Rev. 588 (1959).

9. 25 Ill. App. 2d 56, 165 N.E. 724 (1960).

10. 111 N.W.2d 1 (1961).

weight of authority to the contrary, indicate any 'major trend' toward the general abolition of the doctrine."

The writer is convinced that any drainage of taxpayers' funds by abolition of the doctrine, is the subject of legislative attention in our tripartite system of government — not the courts. The legislature better may inventory the practical effects of creating a Pandora's Box. The courts better may interpret, from a strictly judicial, not economic standpoint, the meaning and extent of legislation. As we have stated in other cases, damaged citizens are not wholly without redress in isolated cases, since under our same system of government, the legislature itself might grant relief to an applicant if his claim properly is processed through the Board of Examiners.[11] It takes little imagination to visualize a situation where, particularly in the remoter areas of a sparsely settled state like this, a school district, or a small town might suffer sudden death were it not protected by a shield of immunity.

Neither the Florida nor Illnois decisions would be operative in the instant case, and it may be equally true of the California ruling. The Michigan decision, with its questionable reasoning, and its bitterly divided court, offers little argument to dispose of precedents of this jurisdiction, and to fly in the teeth of the majority rule.

The cases cited in the dissent's footnote do not show any modern trend away from a sovereign immunity, as suggested by Mr. Chief Justice Wade. In our surrounding sister states, the cases quite definitely challenge and refute any such suggestion. Berger v. Dept. of Highways, 353 P.2d 612 (Colo.) (1960); Vendrell v. School Dist., 360 P.2d 282 (Ore.) (1961); Maffei v. Incorp. Town of Kemmerer, 338 P.2d 808 (Wyo.) (1959); Kilbourn v. City of Seattle, 43 Wash. 2d 373, 261 P.2d 407 (1953); Livingston v. Regents of N.M. College of Agric., 64 N.M. 306, 328 P.2d 78 (1958). (Emphasis added)

11. Utah Constitution, Art. III, Sec. 13; Title 63-6-1, Utah Code Annotated, 1953.